

## **BASIC LIABILITY ANALYSIS FOR PROFESSIONAL DESIGNERS**

Design professionals whether architects or engineers should have a basic understanding of when they are liable in tort law for professional negligence. Tort law must be distinguished from contract law since it deals with the conduct of people, whether lay or professional, rather than with contractual obligations. However, in the case of a professional designer who has entered into a contract for the performance of professional design services, our courts have held in the past that a professional designer may be liable in contract or tort as a result of performing professional design services that are either in breach of a design contract or failed to meet the required professional standard of care.

The design professional will generally have a design contract for professional services with the owner. However, the design professional may be sued by a third party who is injured as a result of what is claimed to be a design defect in the building. Since under those circumstances there is no contract between the injured party and the design professional, it is the design contract between the design professional and the owner that will be examined by the injured party as well as general tort law applicable to professional designers to determine whether the aggrieved injured party has a valid legal claim against the professional designer.

The design professional has an obligation under tort law to exercise that degree of skill and care expected of an architect or engineer under the same or similar circumstances. Not all bad results from professional work constitutes professional negligence. It is only when the professional departs from the professional standard of care and causes damage to property or injury to person that the design professional is liable to the aggrieved party.

Recently, I was evaluating a professional designer's concern that certain employee staff problems and tardy design work was a basis for a claim by the owner for late performance or cost overruns. It was necessary for me to obtain the exact facts regarding the professional designer's internal staff difficulties in order to analyze whether they could reasonably be a cause of the

contractor's late performance or the owner's cost overruns. As in medical negligence, not every bad result is caused by some performance failure by the professional. It is only when the professional fails to provide that degree of skill and care expected of her, thereby causing damage to property or injury to person, that a viable legal claim exists.

In order to conclude that a design professional has failed to exercise that degree of skill and care expected of her under the same or similar circumstances, it is necessary to obtain the expert opinions of expert witnesses. A lay person would not have the foundation to express an opinion with regard to a professional issue of this sort. The jury listens to competing expert opinions in the trial of a lawsuit against a design professional and then selects the expert opinion they believe most applicable and reasonable. Although design professionals as well as other professionals often criticize the jury's role in determining what is the correct professional standard of care, that is the process necessarily involved in trial by jury. Trial by jury is a constitutional right.

It therefore is necessary for a design professional to ask herself the question, am I about to do something, or have I done something which does not constitute that degree of skill and care expected of me under the same or similar circumstances. If a fair analysis of that issue produces an affirmative answer, the planned professional conduct should be altered to conform with the expected professional standard of care. If the answer to that question for acts already irretrievably done, the design professional should contact her professional liability insurance carrier.

When such an analysis is made with regard to past events that cannot be remedied, even if no claim has been made, your professional liability insurance carrier should be notified of your concern. Insurance companies can often provide helpful suggestions long before a claim is

actually made.